NTSB Order No.
EM-147

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of March, 1988

PAUL A. YOST, Commandant, United States Coast Guard,

v.

HUBERT A. FREDICKS, Appellant.

Docket: ME-129

OPINION AND ORDER

Appellant challenges a June 11, 1987 decision of the Commandant (Appeal No. 2450) affirming the revocation of his merchant mariner's license (No. 206 223). The revocation was ordered by Coast Guard Administrative Law Judge Peter A. Fitzpatrick on September 22, 1986 following an evidentiary hearing held on July 24, 1986.[1] The law judge had sustained charges of negligence and misconduct that had been filed in connection with appellant's operation of a passenger carrying vessel. On appeal to the Board, the appellant, by counsel, contends that the revocation should be overturned due to numerous errors assertedly made by the law judge in the conduct of the hearing held in the case and by the Commandant in his review of the law judge's decision on the charges.[2] As we find no merit in any of the appellant's contentions, we will deny the appeal.

The charge of negligence was based on specifications alleging that appellant, while serving on April 26, 1986 as Operator aboard the M/V NATIVE SON, en route with passengers being carried from Tortola, British Virgin Islands to St. Thomas, U.S. Virgin Islands, failed to keep his vessel clear of another vessel being overtaken and then crossed the bow of that vessel, the M/V BOMBA CHARGER, thereby endangering the passengers and crews of both vessels. The charge of misconduct was based on specifications essentially

[1]Copies of the decisions of the Commandant and the law judge are attached.

[2]The Coast Guard had filed a reply brief opposing the appeal.

alleging that in connection with a trip between the same points on May 10, 1968, appellant (1) did not give or provide passengers a safety orientation before getting underway and (2) did not have his license on board the vessel available for inspection.

At the outset we note that many, if not most, of the assignments of error urged first on appeal to the Command--challenging, for example, the adequacy of the specifications, the admissibility of certain hearsay evidence, and the manner in which the hearing was conducted--and now pressed on further appeal to the Board, involve objections that could and should have been presented to the law judge for resolution in the first instance.[3] Although the Commandant could have treated those objections as having been waived by appellant's failure to take timely exception,he undertook in his decision to address them, albeit not as thoroughly as appellant appears to believe was warranted. We have reviewed the record and have satisfied ourselves that the Commandant's decision adequately disposes of the objections that should have been raised during the hearing and that discussion by the Board of them is therefore unnecessary. We will, accordingly, confine our remarks here to those issues that draw in question the correctness of the Commandant's conclusion that the law judge properly found the charges established by the evidence and that the sanction of revocation should be upheld.

With regard to the misconduct charge, appellant argues in effect that the Coast Guard's evidence was insufficient because it does not establish that appellant's inability to produce his license occurred while his vessel was being operated. See 46 CFR 185.10-1. Like the Commandant, we find the argument unavailing, for appellant admitted the misconduct specification relating to his license before the Coast Guard presented its case. See Tr. at 28. Appellant's position that, notwithstanding that admission, the Coast Guard was obligated to put on evidence establishing the specification is frivolous. As to the specification alleging that appellant failed to provide a safety orientation required under 46 CFR 185.25-1(d), appellant argues that the Coast Guard's evidence was inadequate because it only showed that he himself did not give such an orientation (either orally or through posted placards), not that one was not, or could not have been, given by someone else. It is answer enough to this argument to point out that it misstates the record. The Coast Guard's evidence did not just show that appellant had not given a safety orientation, it showed that no orientation had been given on the trip. See Tr. at 136-137. Appellant offered no evidence to contradict that showing.

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[3]Appellant did not engage the services of an attorney until after the hearing had been held.

With respect to the charge of negligence, the law judge rejects as a matter of credibility the testimony of appellant and his witnesses concerning the proximity and track of his vessel in overtaking and passing the BOMBA CHARGER. Appellant has not demonstrated error in the law judge's evaluation and resolution of the conflicting evidence on this charge.

Appellant argues that it was an abuse of discretion for the law judge to impose the sanction of revocation in the absence of evidence demonstrating that the appellant represented a continuing threat to safety of life or property at sea.[4] We find no abuse. The evidence establishing the charge of negligence found proved by the law judge does, we think, support the judgement that revocation was appropriate. The law judge found that appellant, for the apparent purpose of overtaking and passing a competing ferry so that his passengers could be discharged first at the vessels' common destination, had operated the NATIVE SON, while carrying some 106 passengers, within 2-3 feet abreast of the BOMBA CHARGER, carrying about 80 passengers, for an extended period (2-3 minutes) and at a relatively high rate of speed (about 20 knots), all to the substantial alarm and consternation of the passengers on both vessels. Then, after speeding up, appellant cut in front of the BOMBA CHARGER, coming within 3 feet of its bow and forcing it to decelerate rapidly. The law judge further found that this close passing was performed despite the availability of "plenty of sea room" (Decision and Order at 11) to the left of the BOMBA CHARGER and in an area in which that vessel could not maneuver to starboard due to the presence of a reef. Whether appellant was ignorant of the serious risk of harm to which he exposed the persons on both vessels or whether he purposefully chose, for whatever reasons, to expose them to such endangerment, we believe it could be reasonably concluded that appellant's conduct was so mindless or heedless of the safety of those affected by or dependent on his nautical judgment and care that it shows he lacks the degree of responsibility a license holder must possess. Such an individual can, we think, fairly be said to represent a continuing threat to safety of life or property at sea.

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[4]Appellant also contends that the law judge exhibited an attitude of hostility toward him that further draws in question the propriety of the sanction. We find the contention unpersuasive. The fact that the law judge believed that appellant's conduct established that he should not again be allowed to sail under a Coast Guard license, and that he should be prosecuted criminally and have his vessel seized should he attempt to do so, does not demonstrate an inappropriate enmity toward appellant personally.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and

2. The decision of the Commandant affirming the revocation of appellant's mariner's license is affirmed.

BURNETT, Chairman, LAUBER, NALL and KOLSTAD, Members of the Board, concurred in the above opinion and order.